



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 248 OF 2006

CHEVRON KENYA LIMITED..... PLAINTIFF

V E R S U S –

MUVIR HOLDINGS LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI..... 2ND DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 14th January 2016, taken out by Total Kenya Ltd, the 3rd defendant herein. In the aforesaid motion, the 3rd defendant seeks for inter alia an order for stay of execution or enforcement of the judgment and decree delivered on 17th December 2015 or any part thereof pending the hearing of the intended appeal or until further orders of this court. The motion is supported by the supporting and further affidavits of Boniface Abala. When served with the aforesaid motion, Chevron Kenya Ltd, the 1st defendant filed grounds of opposition and a replying affidavit to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have it disposed of by written submissions.
2. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and opposing affidavits. I have further considered the rival written and oral submission. It is the submission of the 3rd defendant that the decretal sum plus costs and interest amounting to ksh.154,503,223/= is a substantial amount which if paid to the 1st defendant (plaintiff in the counter-claim) there is no guarantee that it will be a position to refund the same if the appeal is successful. It was also argued that the 1st defendant has since sold the suit property to third parties. The 3rd defendant further averred that it is in a stable financial position and that it will be in a position to pay the decretal sum if the appeal is unsuccessful. The 3rd defendant further argued that its appeal is arguable hence it is only fair and just to allow it to pursue its undoubted right of appeal. The 3rd defendant urged this court to grant it an order for stay of execution in order to keep the ring even pending appeal. This court was told that the steps taken by the 1st defendant if not arrested will render the intended appeal nugatory and cause irreparable and substantial loss to the 3rd defendant.
3. The 1st defendant urged this court to dismiss the motion on the basis that there is no regular notice of appeal or request for proceedings that has been timeously filed and served as prescribed by Law as against the judgment delivered on 17th December 2015. The 1st defendant further pointed out that the notice of appeal intimates that the intended appeal is against the whole judgment yet the

judgement in question concerns orders and awards against other defendants and parties who have not preferred any appeal. According to the 1st defendant, the 3rd defendant's conduct in preferring such an appeal amounts to acting without instructions or authority and is an abuse of the court process. It was pointed out that in the facts deponed in the affidavit of Boniface Abala, there is no averment nor any exhibit showing that the 1st defendant had authority to act for the other defendants hence there was no valid notice of appeal. The 1st defendant has further argued that the 3rd defendant's application does not meet the threshold set out under Order 42 rule 6(2) of the Civil Procedure Rules. It is particularly pointed out that the 3rd defendant has not offered to provide tangible security for the due performance of the decree.

4. The principles to be considered when determining an application for stay of execution pending appeal are well settled. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, that the application for stay should be made without unreasonable delay.
5. Thirdly, that the court should consider the provision for security for the due performance of the decree. On the first principle, the applicant has stated that the decretal sum exclusive of costs and interest of ksh.154,503,223/= is a substantial amount which if paid to the 1st defendant there is no guarantee that it would be in a position to refund the same. It is averred that the 1st defendant's financial status is unknown and that no evidence has been put forward to show otherwise. The 1st defendant did not seriously answer this averment but it merely stated that the 3rd defendant has not explained the substantial loss it would suffer if the order is not denied. With respect, I agree with the submissions of the 3rd defendant that it would suffer substantial loss if the decretal sum is paid to the 1st defendant and in the end there is no assurance that the 1st defendant would be in a position to refund the same if the appeal succeeds.
6. The 1st defendant has invited this court to determine the validity of the notice of appeal. With great respect I do not think this court has jurisdiction to do so. It is an issue that can only be determined by the Court of Appeal pursuant to the provisions of the appellate jurisdiction act and the Court of appeal rules therein. Consequently I decline to entertain the invitation.
7. The second principle requires the application for stay to be filed without undue delay. I have perused the court record and it is apparent that the motion was filed without undue delay hence the second principle is satisfied.
8. The third principle requires the court to consider the provision for security for the due performance of the decree. The 3rd defendant has stated that it is ready and willing to abide by such terms as the court may order in terms of security. It argued that this court should recognize that the 3rd defendant is in sound financial status which will guarantee that the money is available should the appeal fail. I have already taken into account the argument by the 1st defendant that the 3rd defendant has not made an offer on security. With due respect, whether or not a party makes an offer to provide security, the court is mandated to decide the issue. The court has an unfettered discretion. In the circumstances of this case I think the 3rd defendant should provide security for the due performance of the decree. There is a proposal made from the bar that the 3rd defendant is ready and willing provide a bank guarantee. I find the proposal plausible.
9. In the end I am convinced that the motion is well grounded. Consequently, I grant the applicant an order for stay of execution of the decree pending appeal.
10. On condition that the applicant provides a bank guarantee from a reputable bank for kshs.154,503,223/= within 30 days from the date of this ruling. In default the motion will be treated as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 13th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant